(4)

No. 09-728

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

JON A. JENSEN, JANE DOE JENSEN
and the marital community thereof,

Petitioners,

v.

PAUL A. STOOT, SR. and TAMMIE L. STOOT,
husband and wife, and as parents and guardians of
Paul A. Stoot II; and PAUL A. STOOT II, a minor child,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF

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SUPPLEMENTAL STATEMENT

The following additional facts are added to give context to Stoot's summary of the facts.

In his opposition brief, Stoot tries to paint a picture of an innocent child being brow-beaten by a relentless Detective Jensen who was "not taking no for an answer." Br. Opp. at 2-3.

The undisputed facts in Detective Jensen's police report (attached as a supplemental appendix), however, paint a very different picture. First, the interview took place in an unlocked office with the blinds open, allowing anyone walking by to observe the interview. Supp. App. at SA-11.

Second, while the police report does confirm that Stoot repeatedly denied touching A.B.'s vaginal area before confessing, it also demonstrates that Stoot readily admitted to other inappropriate behavior that would have spurred any investigator to continue to press with questions. Stoot admitted:

- A.B. regularly sat on his lap, sometimes giving him erections. Supp. App. at SA-8, SA-10

- A.B. kissed and licked him and tried to touch his penis on several occasions. Supp. App. at SA-9

- He was not "interested" in A.B. because she was "too small," but "if she had been

> five, or six, or seven years old or a tall four year old he would have been interested." Supp. App. at SA-9
>
> - He was regularly home alone with A.B. Supp. App. at SA-8
>
> - A.B. had told Stoot's sister that Stoot had touched her, so Stoot was not surprised A.B. told someone else. Supp. App. at SA-9

In light of these admissions, any objectively reasonable detective in Detective Jensen's position would have continued to press Stoot, despite Stoot's denials that he had touched A.B.'s vaginal area.

SUPPLEMENTAL REASONS FOR GRANTING THE PETITION

A true conflict exists between the Circuits that is already producing inconsistent results in district court cases.

The Ninth Circuit's opinion squarely frames the issue that creates these conflicting results – whether a statement is "used" in a criminal case once charges are filed, or whether the statements must first be used in an actual trial before a violation occurs.

Moreover, as noted by *Chavez* – and ignored by Stoot – this Court's prior Fifth Amendment cases discussing the privilege against self-incrimination outside of the criminal context do not decide this issue.

Finally, the Ninth Circuit opinion will have a chilling effect on legitimate law enforcement conduct and reversing that decision will not sanction abuses.

A. The Conflict Between the Six Federal Circuits Is Ripe

Stoot incorrectly asserts that the split between the Circuit Courts of Appeal is not "fully developed." Br. Opp. at 9. The Ninth Circuit's analysis of this acknowledged split demonstrates the contrary is true: "The Third, Fourth, and Fifth Circuits have applied *Chavez* to bar recovery under the Fifth Amendment unless the allegedly coerced statements were admitted against the defendant *at trial*. . . . The Seventh and Second Circuits disagree." Pet. App. at 30a.

Moreover, Stoot does not present a fair reading of the decisions of the Third, Fourth, and Fifth Circuits, as those decisions demonstrate that within those circuits a violation of the Fifth Amendment, actionable under § 1983, does not occur until a statement is used against a defendant in a criminal trial – a clear split from the decisions of the Second, Seventh, and Ninth Circuits.[1]

---

[1] This Court has, of course, granted certiorari even when there only "appeared" to be a conflict. *See United States v. National Bank of Commerce*, 472 U.S. 713, 719 (1985) (decision "appeared to conflict, directly or in principle, with decisions of other Courts of Appeal") and *Oregon Dept. of Fish & Wildlife v. Klamath Indian Tribe*, 473 U.S. 753, 764 (1985) (same).

1. The Third Circuit's Decision in *Renda v. King* Exhibits a Clear and Actual Conflict

Stoot attempts to distinguish the Third Circuit's holding in *Renda v. King*, 347 F.3d 550 (3d Cir. 2003), by selectively citing to the court's opinion. Br. Opp. at 10-11. However, the decision in *Renda* directly conflicts with the Ninth Circuit's decision and establishes that a claim, such as Stoot's, could not be the basis for a civil § 1983 action within the Third Circuit unless the statement was used in a trial. In *Renda*, the plaintiff/criminal suspect's statements were presumably used against her to file charges, arrest her, arraign her, and incarcerate her for 13 days, but were later suppressed and the charges dropped. *Id.* at 554.

Stoot argues *Renda* does not create a true conflict that needs to be resolved because the Third Circuit's decision relies on a 1994 case – *Giuffre v. Bissell*, 31 F.3d 1241 (3d Cir. 1994) – that predates *Chavez* and *Dickerson v. United States*, 530 U.S. 428 (2000). But Stoot fails to acknowledge that the Third Circuit considered whether *Chavez* and *Dickerson* modified its decision in *Giuffre* and concluded that its prior decision was still binding precedent and fully applicable in the context of *Renda*. In fact, the court specifically provided that "unlike in *Chavez*, [the plaintiff's] statement was used in a criminal case in one sense (*i.e.*, to develop probable cause sufficient to charge her)." *Id.* at 559. However, the court explained that "[t]o the extent that *Chavez* leaves open the issue of when a statement is used in a criminal proceeding . . . our prior decision" controls. *Id.*

Far from relying on an irrelevant prior case, the Third Circuit considered subsequent changes in the law, factual differences in the case before it, and concluded that its prior decision in *Giuffre* was correct – that "it is the use of coerced statements during a criminal trial, and not in obtaining an indictment, that violates the Constitution." *Id.*

Moreover, district courts in the Third Circuit have subsequently quoted *Renda*, demonstrating that it remains binding precedent. *See Folk v. Attorney General of Pennsylvania*, 425 F. Supp. 2d 663, 667 (W.D. Pa. 2006) ("the issue is settled by the binding authority of *Renda v. King*") and *Rivera v. Hopatcong Borough Police Dept*, No. 08-2721, 2010 WL 446040 *4 (D.N.J. Feb. 3, 2010) (citing *Renda* and holding that "although [plaintiff] was charged and brought to trial, there is no allegation that any allegedly coerced statements from the interrogation were used against her at trial").

Stoot is correct, however, in pointing out that the Seventh Circuit's decision in *Sornberger v. City of Knoxville*, 434 F.3d 1006 (7th Cir. 2006), rejected this reasoning and reached a contrary conclusion. Br. Opp. at 11. But the Seventh Circuit's disagreement with settled Third Circuit law further demonstrates that a clear and actual split exists between the circuits.

2. The Fourth Circuit's Decision in *Burrell v. Virginia* Exhibits a Clear and Actual Conflict

Stoot incorrectly characterizes the Fourth Circuit's precise holding in *Burrell v. Virginia*, 395 F.3d 508 (4th Cir. 2005), as dicta. Br. Opp. at 12. Stoot correctly notes

that the Fourth Circuit's analysis examined Justice Souter's concurrence in *Chavez*, which focused on the *courtroom use* of compelled testimony. Yet, in holding that the *Burrell* claim should be dismissed on summary judgment, the Court explained that the Plaintiff did "not allege any *trial* action that violated his Fifth Amendment rights." *Burrell*, 395 F.3d at 514. The Fourth Circuit's careful use of these terms throughout the opinion is telling and its choice to phrase its holding as requiring a *trial* use of compelled testimony cannot be characterized as mere dicta.

Moreover, even if *Burrell*'s ruling were dicta, the district courts in that circuit will still look to that opinion for guidance. *See Bellamy v. Wells*, 548 F. Supp. 2d 234, 238 (W.D. Va. 2008) (citing *Burrell* as authority for the proposition that no Fifth Amendment violation occurs if the trial use of a statement is not considered); *see also Branch v. Coca-Cola Bottling Co. Consol.*, 83 F. Supp. 2d 631, 634-35 (D.S.C. 2000) ("dictum from the court of appeals should be considered presumptively correct by the district courts within that circuit" and "[o]nly when a district court is convinced that its court of appeals' dictum is clearly incorrect should the dictum be disregarded") and *Guyon v. Basso*, 403 F. Supp. 2d 502, 509 (E.D. Va. 2005) (following *Branch*). Additionally, even if the Fourth Circuit's holding is dicta, it indicates which direction the Fourth Circuit will likely go. *See Hall Street Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576 (2008) ("the Eighth Circuit has expressed agreement with the former side in dicta").

3. The Fifth Circuit's Decision in *Murray v. Earle* Exhibits a Clear and Actual Conflict

Stoot argues that the Fifth Circuit's holding in *Murray v. Earle*, 405 F.3d 278 (5th Cir. 2005), is also dicta because the plaintiff's statements were used at trial and the case was resolved on qualified immunity grounds. Br. Opp. at 15. In *Murray*, there appears to have been both pre-trial uses and, after an unsuccessful suppression hearing, trial uses of the confession. *Murray*, 405 F.3d at 284. The Fifth Circuit found that the court's decision to admit the statements after a suppression hearing served as an intervening cause relieving the officers who interrogated the plaintiff of any liability for the use of the statements at trial. *Id.* at 293. The judge's actions could not have been a superseding cause, however, for actions taken prior to the suppression hearing. Thus, the Fifth Circuit's ruling that trial use was required is not dicta – it was as central part of the analysis.

This is further demonstrated by the fact that the district courts in the Fifth Circuit have followed Murray as binding precedent. *See Holt v. Jefferson Parish Sheriff's Office*, No. 07-3606, 2007 WL 4114357 (E.D. La. Nov. 16, 2007) (citing *Murray* and holding that no § 1983 Fifth Amendment action for coerced statement where plaintiff was still awaiting trial and therefore statement had not been used at trial) and *King v. City of Bossier City*, No. 06-1201, 2007 WL 1791215 (W.D. La. June 19, 2007) (citing *Chavez*, *Murray*, *Renda*, and *Burrell* and finding no claim where there was no evidence that statement was used against the plaintiff at a trial).

Thus, the decisions by the Third, Fourth and Fifth circuits are all binding decisions that are being followed by the district courts, creating a fully developed circuit split that must be resolved.

B. The Ninth Circuit's Decision Squarely Presents the Issue This Court Left Open in *Chavez*, Making This the Ideal Case to Resolve that Open Issue.

Stoot argues his case is not a proper "vehicle" for resolving the question left open by *Chavez* – when does a "criminal case" begin? Br. Opp. at 16. His arguments, however, are based on incomplete factual assumptions. When his claims are put in context, those arguments demonstrate how this is the ideal case to resolve this open issue.

1. Stoot Was Only Confronted with His Statement at the Suppression Hearing.

Stoot suggests that because he was actually confronted by his own allegedly coerced statements under oath, there was a violation under the plain language of *Chavez*, so granting certiorari will not resolve anything.

Stoot was only confronted at the suppression hearing itself. Thus, under Stoot's argument, if a defendant successfully challenges the use of his statement prior to trial, there would automatically a Fifth Amendment violation. The Ninth Circuit rejected this argument as circular. Pet. App. at 34a n.14. Stoot did not file a cross petition challenging this aspect of the Ninth Circuit's opinion. Many Fifth Amendment

claims will arise out of a court's ruling at a suppression hearing that a statement was involuntary. Many of those rulings will result, at least in part, from a suspect taking the stand, where he is confronted by his earlier statement. Thus, Stoot's case presents a common factual situation, making this case the ideal vehicle for resolving the question of "when" a Fifth Amendment violation occurs.

2. The Judge Who Presided Over the Suppression Hearing Was Not the Same Judge Who Would Have Tried the Case Against Stoot

Stoot also asserts this is not a good "vehicle" to resolve the question of "when" a Fifth Amendment violation occurs because this is a juvenile case.[2] Br. Opp. at 17. Juvenile cases, according to Stoot, are different from adult criminal proceedings because the judge who rules on evidentiary issues will also be the trier of guilt or innocence. Br. Opp. at 17-19.

Stoot fails to mention, however, that the judge who presided at the suppression hearing was *not* the same judge who would have served as the trier of fact. Pet. App. at 54a. Snohomish County Superior Court Judge Ronald Castleberry presided over the suppression hearing, but a different Superior Court Judge, Thomas Wynn, was assigned to try the case and entered the order of dismissal. Pet. App. at 53a-54a.

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[2] The Fifth Circuit case – *Murray v. Earle* – also involved a juvenile suspect/plaintiff.

Thus, it was not the case here that the judge ruling on all of the evidentiary motions was the same judge who would have served as the trier of fact. Moreover, a juvenile's position is no different than an adult defendant who waives his right to a jury.

C. *Chavez* Demonstrates that the History of the Fifth Amendment Jurisprudence Leaves Open the Question of When a Fifth Amendment Violation Occurs.

Stoot next argues that the Court should not accept review because the Ninth Circuit decision is consistent with a long line of cases from this Court holding that the privilege against self-incrimination can be asserted in civil proceedings. Br. Opp. at 19.

In *Chavez*, this Court held that this line of cases did not alter the Court's conclusion that this right is only violated if a coerced confession is used in a criminal case. *Chavez v. Martinez*, 538 U.S. 760, 767-773 & nn. 2-4 (2005). Thus, Stoot is asking the Court to accept an argument it already rejected. Moreover, Stoot ignores another line of cases that characterize the Fifth Amendment as a "trial right." *See, e.g.*, *Withrow v. Williams*, 507 U.S. 680, 692 (1993); *United States v. Verdugo-Urquidez*, 494 U.S. 259, 264 (1990).

In *Chavez*, this Court recognized that neither of these two lines of cases resolved the question of when a Fifth Amendment claim ripens. *Chavez*, 538 U.S. at 766-773. Thus, the Court should reject Stoot's claim that the Ninth Circuit's opinion is proper and that certiorari should be denied based on the cases Stoot cites.

D. The Ninth Circuit's Decision Will Have a Chilling Effect on Legitimate Police Conduct

Stoot mischaracterizes Detective Jensen's appeal by claiming that Detective Jensen is arguing that law enforcement officers do not have to follow rules governing interrogations. Br. Opp. at 24. Stoot then argues that it is only illegal conduct that will be chilled. *Id.*

This is simply wrong. First, it is uncontested that Detective Jensen reasonably believed that Stoot had voluntarily waived his rights and agreed to speak with the detective. Pet. App. at 70a-71a. Second, Detective Jensen expressly argued that if the law enforcement officer is not concerned with following the rules governing interrogations and is interrogating a suspect for some reason other than to obtain an admissible confession, the suspect would have potential relief under the Fourteenth Amendment. Pet. at 24.

Thus, Detective Jensen agrees that law enforcement officers cannot ignore the rules that govern interrogation and escape liability. In light of Detective Jensen's good faith effort to comply with the law, however – and not any intentional disregard for the rules – holding him liable would have a chilling effect on other law enforcement officers proceeding in good faith. Moreover, because of the existing suppression remedy and ability to bring a Fourteenth Amendment claim, there is no justification to extend civil liability to any use of an allegedly coerced confession before the suppression hearing is held.

CONCLUSION

For the reasons stated herein, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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